

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

NOV 17 2010

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2010-0249-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
ADAM EDWARD FOX,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091132001

Honorable Christopher Browning, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent

Patrick C. Coppen

Tucson  
Attorney for Petitioner

ECKERSTROM, Judge.

¶1 Adam Fox petitions this court for review of the trial court's May 19, 2010 order denying his of-right petition for post-conviction relief filed pursuant to Rule 32,

Ariz. R. Crim. P. We will not disturb the court's ruling unless it clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Fox, who is required to register as a sex offender, was convicted pursuant to a plea agreement of failing to give notice of his change of address. *See* A.R.S. §§ 13-3822, 13-3824. He admitted having one historical prior felony conviction, and the trial court sentenced him to the presumptive prison term of 4.5 years. Fox then filed a petition for post-conviction relief, asserting his counsel had been ineffective because she had told him he would be sentenced to a mitigated prison term if he pled guilty, and that he would not have done so had he known he could receive a longer term of imprisonment. He asserted counsel also was ineffective in failing to investigate and present at sentencing “all available mitigation” evidence which “may have had an impact upon the sentence Petitioner received.” Finally, Fox contended the court had relied on incorrect information in sentencing him and did not give adequate weight to the evidence in mitigation.

¶3 The court denied relief without an evidentiary hearing in a thorough, well-reasoned minute entry order. Among the many findings the court made was that Fox had not been prejudiced by counsel's performance. Because the court correctly addressed and resolved the claims, and because, as discussed below, Fox has not sustained his burden of establishing the trial court abused its discretion in denying his petition, we adopt the court's order. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court correctly identifies and rules on issues raised “in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose

would be served by this court rehashing the trial court's correct ruling in a written decision").

¶4 On review, Fox asserts the trial court erred because it did not conduct an evidentiary hearing on his claims and erred in finding he had failed to establish he had been prejudiced by trial counsel's purported assurances that Fox would receive a mitigated sentence if he pled guilty. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (to establish claim of ineffective assistance of counsel warranting relief, defendant must show counsel's performance was deficient and prejudicial); *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990) ("A defendant is entitled to an evidentiary hearing when he presents a colorable claim, that is a claim which, if defendant's allegations are true, might have changed the outcome."). However, Fox fails to address the court's determination that he did not demonstrate he was prejudiced. At his change-of-plea hearing, the court correctly informed Fox of the range of sentences he could face upon pleading guilty and he denied anyone had promised him "exactly what the sentence will be in this case." Similarly, Fox does not address the court's determination that the mitigating factors Fox asserted his counsel had failed to present at sentencing were, in fact, presented or, even if not presented, would not have altered the court's decision that the presumptive prison term was appropriate. Accordingly, Fox has not demonstrated the court abused its discretion in summarily denying post-conviction relief based on his claims of ineffective assistance of counsel. *See Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d at 948.

¶5 When it initially sentenced Fox, the court stated it intended to impose the presumptive term of imprisonment, rather than an aggravated term, because Fox had “attempt[ed]” to register as a sex offender. Fox contended in his petition for post-conviction relief that the court therefore had relied on incorrect information because Fox had registered as a sex offender using his mother’s address, had “still [been] living at her house for the most part” at the time of his offense, and had left her home only for “a few days” before he had returned there. In short, as we understand his argument, Fox asserted he should have received a mitigated sentence because he was innocent of the crime to which he had pled guilty.<sup>1</sup> The trial court rejected this claim because, among other reasons, it was “clearly contradicted both by the record and by the plea [Fox] entered, including the factual basis therefor[], which [Fox] acknowledged to be correct.”

¶6 Fox reurges this claim on review, again asserting he had not “merely attempt[ed] to register.” Again, however, Fox has not persuaded us the trial court abused its discretion in finding this claim meritless. Fox relies on *State v. Mount*, 149 Ariz. 394, 396, 719 P.2d 280, 282 (App. 1986), in which we stated that a defendant’s due process right to a fair sentencing proceeding includes “the right to be sentenced on the basis of correct information.” But nothing in *Mount* suggests a pleading defendant may challenge the propriety of his sentence by claiming the factual basis of his plea was insufficient. Nor do we find any other authority supporting this argument. Fox admitted at his

---

<sup>1</sup>To the extent Fox is suggesting the trial court mistakenly believed he never had properly registered as a sex offender, and instead had only attempted to do so, it is clear from the sentencing transcript that the court understood Fox had been compliant with the law at one time, but subsequently had changed his address.

change-of-plea hearing that he had changed his address and failed to give proper notice. He cannot now argue that admission was untrue. *See State v. Rosario*, 195 Ariz. 264, ¶ 21, 987 P.2d 226, 229 (App. 1999); *see also State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993) (pleading defendant waives all non-jurisdictional defects).

¶7 Although we grant review of Fox’s petition, we deny relief.

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge